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COMPARATIVE STUDY OF THE FORMATION OF  
ELECTRONIC CONTRACTS IN AMERICAN  
LAW WITH REFERENCES TO  
INTERNATIONAL LAW

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# COMPARATIVE STUDY OF THE FORMATION OF ELECTRONIC CONTRACTS IN AMERICAN LAW WITH REFERENCES TO INTERNATIONAL LAW

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## I. INTRODUCTION

An understanding of the basic principles that regulate contract formation of great importance when deciphering the most appropriate ways of forming a new contract or when assessing the legality of an already existing contract. While the basic rules of contract formation are generally applicable to all types of contracts regardless of the method utilized in their creation, there are some juridical rules that apply specifically to electronically created contracts.

The fundamental principles of contract formation in American law can be found in the Uniform Commercial Code (UCC)<sup>1</sup> although other laws have been enacted to regulate electronic transactions generally following the same principles of the UCC. Those laws are the Uniform Computer Information Transactions Act (UCITA),<sup>2</sup> the Uniform Electronic Transactions Act (UETA),<sup>3</sup> and the Electronic Signatures in Global and National Commerce Act (E-SIGN).<sup>4</sup> Under international law there is the United Nations Convention on Contracts for the

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1. See UNIF. COMMERCIAL CODE §§ 2-201 to 2-209 (2003) [hereinafter U.C.C.].
2. See UNIF. COMPUTER INFO TRANSACTIONS ACT § 101:4 (2002) [hereinafter U.C.I.T.A.].
3. See UNIF. ELEC. TRANSACTIONS ACT § 4 (1999) [hereinafter U.E.T.A.].
4. Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 (2000).

International Sale of Goods (CISG)<sup>5</sup> and the UNCITRAL Model Law on Electronic Commerce (MLEC).<sup>6</sup> It is important to mention that the MLEC, in particular, focused on having basic and flexible principles that would facilitate its adoption within the laws of the member countries in order to achieve uniformity in the laws of international trade.<sup>7</sup> Nevertheless, many countries that have adopted MLEC have not been able to avoid conflicts between the laws of the member countries in the area of electronic commerce<sup>8</sup> because the domestic laws in accordance to MLEC have not been compatible with previous international conventions requiring physical documents in order to maintain commercial viability. Moreover, because of the "supremacy of international treaty law," including pre-existing commercial conventions, over subsequent ordinary domestic law, such as MLEC-based commercial law, a potential conflict exists in many cases between domestic law permitting electronic contracts and pre-existing treaties requiring physical documents.<sup>9</sup>

The United Nations Convention on the Use of Electronic Communications in International Contracts (CUECIC)<sup>10</sup> developed as an answer to the divergence that exists between the domestic laws of the member countries in matters pertaining to electronic commerce.<sup>11</sup> The CUECIC has a primary objective to equalize the legal consequences of electronic communications, within the context of international commerce, with the previous international conventions that required physical documents.<sup>12</sup> Currently, only two countries are signatories of the CUECIC,<sup>13</sup> while MLEC has influenced legislation in twenty-seven countries.<sup>14</sup>

The objective of this article is to make a comparative analysis of the aforementioned laws in relation to the main elements involved in contract formation. An electronic contract is an agreement created and "signed" through electronic means. In other words, it is not necessary to use paper or some other palpable type of copy. This can be carried out through e-mail or, in forming an acceptance, when the party clicks on an icon that indicates such an

5. United Nations Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, 19 I.L.M. 671 [hereinafter C.I.S.G.].

6. UNCITRAL, Model Law on Electronic Commerce, UN GAOR 51st Sess., 85th plenary mtg., UN Doc. A/51/162 (1996) [hereinafter MLEC].

7. A. Brooke Overby, "UNCITRAL Model Law on Electronic Commerce: Will Cyberlaw Be Uniform? An Introduction to the UNCITRAL Model Law on Electronic Commerce," *Tul. J. Int'l & Comp. L.*, vol. 7 (1999), pp. 219, 225 [hereinafter Overby].

8. Charles H. Martin, "The UNCITRAL Electronic Contracts Convention: Will It Be Used or Avoided?," *Pace Int'l L. Rev.*, vol. 17 (2005), pp. 261, 263 [hereinafter Martin].

9. *Id.* at 263-64.

10. UNCITRAL, United Nations Convention on the Use of Electronic Communications in International Contracts, UN Doc. A/60/515 (Nov. 23, 2005) [hereinafter CUECIC].

11. Martin, note 8, at 264.

12. *See id.* at 263-264.

13. *See* [http://www.uncitral.org/uncitral/es/uncitral\\_texts/electronic\\_commerce/2005\\_Convention\\_status.html](http://www.uncitral.org/uncitral/es/uncitral_texts/electronic_commerce/2005_Convention_status.html) (last visited April 20, 2006).

14. *See* [http://www.uncitral.org/uncitral/es/uncitral\\_texts/electronic\\_commerce/1996Model\\_status.html](http://www.uncitral.org/uncitral/es/uncitral_texts/electronic_commerce/1996Model_status.html) (last visited April 20, 2006).

acceptance.<sup>15</sup> Although the laws are similar in many aspects, they also have important differences that require in depth analysis.

The international doctrine on computer law distinguishes between computerized contracts and those contracts created through electronic, optical or other technological means.<sup>16</sup> While the former refers to those contracts relating to computer equipment (technical support contracts, maintenance contracts, and others), the latter refers to any type of contract whose perfection takes place by electronic, optical, or other technological means.<sup>17</sup>

It is appropriate first to make a brief review of the important technological changes that affect commercialization methods, which in turn leads us to observe from a juridical perspective the increasing diffusion of electronic commerce.

Technological development has recently permitted the appearance of new types of information and communication means that have configured what is known as the *information society*.<sup>18</sup> Gema Botana García, an electronic commerce specialist and professor at the prestigious Universidad Europea de Madrid, indicates that the so called *new information technologies* incorporate changes which substantially transform the economy, human relations, culture, and politics in our society, allowing us to speak of the first and fastest global technological revolution.<sup>19</sup> The utilization of new communication technologies, such as developmental instruments of electronic commerce, gives obvious advantages, but also brings risks and uncertainties to electronic contracting.<sup>20</sup> "Consequently, it is necessary to find the adequate [juridical] solutions that will reduce, if not eliminate, said risks and uncertainties which are inherent nowadays in transactions by electronic means and that will allow for secure electronic commerce."<sup>21</sup>

Juridically, it is possible to affirm that technological change directs legislative change. Summarizing the legislation in the United States, as previously mentioned, in addition to the UCC (whose second original article was considered the crown jewel of the Code) and E-SIGN (which is a federal law), one can observe the presence of two other relatively uniform laws on electronic commerce available for their adoption in all of the states. These two laws are UETA and UCITA, both of which include substantial differences in their content.

Authoritative sources, particularly Professor Arthur Rosset—a well-respected American academician—assert that UETA could be principally adopted by the

15. Nolo, *Making Contracts Online: Electronic Signatures*, at <http://www.nolo.com/lawcenter/ency/article.cfm/objectID/029C847E-2EFC-4913-B6DDC5849ABE81F9/catID/806B7BA0-4CDF-4221-9230A3135E2DF07A> (last visited Apr. 3, 2006).

16. Miguel Angel Davara Rodríguez, *MANUAL DE DERECHO INFORMÁTICO* 191 (1997); JULIO TÉLLEZ VALDÉS, *DERECHO INFORMÁTICO* 95 (2d ed. 1996).

17. *See* C.C.F. Art. 1805; Cód.COM. Art. 80.

18. Gema Botana García, *Noción de Comercio Electrónico*, in *COMERCIO ELECTRÓNICO Y PROTECCIÓN DE LOS CONSUMIDORES* 5, 5 (J. M. Badenas Carpio et al. eds., 2001) [hereinafter García].

19. *Ibid.*, at 58.

20. García, note 18, p. 58.

21. *Ibid.*

states and would offer a flexible frame for electronic commercial transactions in the United States, at both state and national levels. Alternatively, "UCITA's future is more problematic . . . and will be a source of controversy."<sup>22</sup> Rosset finds the basis to affirm the former statement in the formation process that was followed by both laws and the interconnections between national and international organizations that have worked to give the laws shape.<sup>23</sup>

The following commentaries, stated by the same author, will explain the above statements. The purpose of UETA is to supplement the existing legislature for the limited purpose of using electronic media for determinate transactions while not changing the substantive law of these transactions in other aspects.<sup>24</sup> In other words, UETA is foreseen as a group of procedural rules, with the intention of making electronic transactions equivalent in every way to documented transactions, while leaving the rules on the formation of contracts unchanged.<sup>25</sup> Additionally, UETA captures United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce (MLEC)<sup>26</sup> as its basis both in form and in content.<sup>27</sup>

Rosset continues by indicating that, in contrast to UETA, the document that came to be known as UCITA could not be considered simply at a procedural level because its editors adopted a substantive approach that presented conflicts with more fundamental issues.<sup>28</sup> In addition, the majority of people involved in this project had strong professional ties linking them to commercial interests,<sup>29</sup> and few identified with consumers.<sup>30</sup> The version of the document that became UCITA generated controversies and strong criticism from groups of consumers who believed that it perfectly adapted itself to the interests of the computer programming industry.<sup>31</sup>

## II. FIELD OF APPLICATION

The UCC<sup>32</sup> is utilized in transactions involving goods or personal property, but does not apply to transactions that, although taking the form of a contract

22. Arthur Rosset, *La Regulación Legislativa del Comercio Electrónico: Una Perspectiva Norteamericana*, 8 *Revista de la Contratación Electrónica* [RCE] 21, 26 (2000).

23. *Ibid.*

24. *Ibid.* at 34.

25. *Ibid.* at 32.

26. See CUECIC (2005).

27. See, e.g., U.E.T.A., § 2 (1999); see also Rosset, note 13, at 32.

28. Rosset, note 13, at 36.

29. *Ibid.*

30. *Ibid.*

31. *Ibid.*

32. Although the UCC was last amended in 2003, the pre-2003 version to the UCC is still in effect in most states, including the U.S. Virgin Islands. Thus, it is recommended you review the latest applicable state statute (e.g., Business and Commerce Code) for the current regulation within the relevant jurisdiction. See also, U.C.C. § 1-101:2 (2003).

of sale and purchase, are carried out with the intent of operating only as security transactions.<sup>33</sup> Article 2 applies only to contracts connected with the present or future sale of goods.<sup>34</sup> Generally, dispositions contained in Article 2 are applicable only to contracts for the sale of goods with a value of \$5,000 or more.<sup>35</sup> In such transactions, the UCC dictates several requirements, most importantly that such contracts are not enforceable by way of action or defense unless there is some *record* sufficient to indicate that a contract for sale has been made between the parties and is signed by the party against which enforcement is sought or by the party's authorized agent or broker.<sup>36</sup> It should be noted that a majority of states have not established a discernible trend toward active and widespread adoption of the amended UCC from 2003 and each individual state within the United States has its own code for transactions involving goods. Thus, it is advisable to check specific state requirements when the question of the statute of frauds arises (ex. in Texas, Article 2 of the Texas Business and Commerce Code applies to contracts for the sale of goods under the previous UCC requirements of a *writing* for contracts for value of \$500 or more).<sup>37</sup> The term *writing* has been replaced in the revised UCC Article 2 by the term *record*, which includes not only traditional paper writings but also electronic forms. The recognition of electronic records as equivalent to the traditional concept of a writing complies with UETA enacted in more than forty states and E-SIGN. The term "goods" under this law means all things movable at the time of identification to a contract for sale, including future goods, specially manufactured goods, the unborn young of animals, and growing crops.<sup>38</sup> The phraseology of the prior uniform statutory provision has been changed so that the definition of goods is based on the concept of movability and the term "chattels personal" is no longer used.<sup>39</sup> It is not intended to deal with things that are not fairly identifiable as movables before the contract is performed.<sup>40</sup> Growing crops are included within the definition of goods since they are frequently intended for sale. The concept of "industrial" growing crops has been abandoned, because under modern practices fruit, perennial hay, nursery stock and the like must be brought within the scope of this amended Article.<sup>41</sup> The young of animals are also included expressly in this definition since they, too, are frequently intended for sale and may be contracted for before birth.<sup>42</sup> The period of gestation of domestic animals is such that the provisions of the section on identification can apply as in the case of crops to be planted. The reason of this definition also

33. U.C.C. § 2-102 (2003).

34. *Id.* § 2-106(1).

35. *Ibid.* § 2-201(1).

36. *Ibid.*

37. V.C.T.A., Bus. & C. § 2.201.

38. *Ibid.* § 2-103(1)(k).

39. See *Ibid.* § 2-105, official cmt. 1 (2003).

40. *Ibid.*

41. *Ibid.*

42. *Ibid.*



leads to the inclusion of a wool crop or the like as "goods" subject to identification under the amended Article.<sup>43</sup> The exclusion of "money in which the price is to be paid" from the definition of goods does not mean that foreign currency which is included in the definition of money may not be the subject matter of a sales transaction.<sup>44</sup> "Goods" is intended to cover the sale of money when money is being treated as a commodity but not to include it when money is the medium of payment.<sup>45</sup> When the transaction includes the buying and selling of goods in conjunction with services, the UCC applies only in cases where the primary purpose of entering into the contract is to obtain goods.<sup>46</sup>

On the other hand, the CISG is applicable to formation of contracts for the buying and selling of goods between parties whose principle places of business are in different countries that have ratified this Convention.<sup>47</sup> Alternatively, the CISG applies "when the rules of private international law lead to the application of the law of a Contracting State."<sup>48</sup> Additionally,

the fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealing between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.<sup>49</sup>

"Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention."<sup>50</sup> Generally, there are three essential requirements for its application: the contract must have been formed after January 1, 1988; the parties must have their principle places of business in different nations; and both parties must be signatories to the CISG.<sup>51</sup> This Convention is not applicable to transactions related to the sale of goods for personal, familiar, or household use unless the seller did not know and had no

43. See *id.* § 2-105, official cmt. 1 (2003).

44. *Ibid.*

45. *Ibid.*

46. See, e.g., *Perlmutter v. Beth David Hosp.*, 123 N.E.2d 792, 795 (N.Y. 1954).

47. C.I.S.G., Apr. 10, 1980, 19 I.L.M. 671, art. 1(1). As of August 20, 2003, 62 countries have adopted this convention: Argentina, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Burundi, Canada, Chile, China (PRC), Columbia, Croatia, Cuba, Cyprus, Czech Rep., Denmark, Ecuador, Egypt, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Republic of Korea, Kyrgyzstan, Latvia, Lesotho, Liberia, Lithuania, Luxembourg, Mauritania, Mexico, Moldova, Mongolia, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Romania, Russian Federation, Saint Vincent & Grenadine, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States, Uruguay, Uzbekistan, Yugoslavia, Zambia. Albert H. Kritzer, CISG: Table of Contracting States, at <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> (last updated January 15, 2006).

48. C.I.S.G. Art. 1(1) (1980).

49. *Ibid.* at Art. 1(2).

50. *Ibid.* at Art. 1(3).

51. Gary Kenji Nakata, *Filanto S.P.A. v. Chilewich International Corporation: Sounds of Silence Bellow Forth Under the CISG's International Battle of the Forms*, *Transnational Law*, vol. 7 (1994), pp. 141 and 147.

way of knowing that the goods would be used for such purposes.<sup>52</sup> Neither does the CISG apply to transactions related to stocks, shares, investment securities, negotiable instruments and money, ships, vessels, hovercrafts, aircrafts, or electricity.<sup>53</sup>

Under the CISG, "contracts for the supply of goods to be manufactured are to be considered sales, unless the party who ordered the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production."<sup>54</sup> The decrees of the CISG do "not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists [of] the supply of labour [sic] or other services."<sup>55</sup> Additionally, the CISG does not contain decrees related to: the validity of the contract; the effect the contract may have on the goods sold;<sup>56</sup> or "the liability of the seller for [the] death or personal injury caused by the goods to any person."<sup>57</sup>

Approved in 2000, UCITA applies to computer information transactions,<sup>58</sup> which are defined under this Act as "transactions formed with the intent to create, modify, transfer, or license computer information or informational rights in computer information."<sup>59</sup> In UCITA, the term "computer information" means "information in electronic form which is obtained from or through the use of a computer or which is in a form capable of being processed by a computer" and "includes a copy of the information and any documentation or packaging associated with the copy."<sup>60</sup>

UCITA indicates that, should a "transaction include computer information and goods, this [Act] applies to the part of the transaction involving computer information, informational rights in it, and creation or modification of it."<sup>61</sup> In all other cases, "this [Act] applies to the entire transaction if the computer information and informational rights, or access to them, is the primary subject matter. . . ."<sup>62</sup> Among other things, UCITA does not apply to a financial services transaction, an insurance services transaction, or an agreement for the creation, acquisition, use, distribution, modification, reproduction, adaptation, transmission, or display of audio or visual programming.<sup>63, 64</sup>

52. C.I.S.G., Art. 2 (1980).

53. *Ibid.*

54. C.I.S.G. Art. 3(1) (1980).

55. *Ibid.* Art. 3(2).

56. *Ibid.* Art. 4.

57. *Ibid.* Art. 5.

58. U.C.I.T.A. § 103(a) (2002). This law has been adopted only in Virginia and Maryland as of April 2, 2006.

59. See *id.* § 102(a)(11).

60. *Ibid.* § 102(a)(10).

61. *Ibid.* § 103(b)(1).

62. *Ibid.* § 103(b)(3).

63. *Ibid.* § 103(d)(3)(A).

64. *Ibid.* § 103(d)(1).

UCITA also does not apply to motion pictures, sound recordings, musical works, or phonorecords.<sup>65</sup> Equally, a contract of employment of an individual is not regulated by this Act.<sup>66</sup> It is worth mentioning that, if UCITA were to conflict with Article 9 of the UCC (related to financial services transactions), the UCC would govern.<sup>67</sup> Generally, but with several exceptions, "a contract requiring payment of [a contract fee of] \$5,000 or more is not enforceable by way of action or defense unless" a record exists that a contract has been formed.<sup>68</sup>

Still, UCITA is under much scrutiny because of its relevance to non-negotiated or standard form licenses that accompany many software packages and has only been ratified in two states (Maryland and Virginia).<sup>69</sup> Often called "shrink-wrap" or "click-wrap" licenses, these agreements accompany products that are sold in "shrink-wrap" packaging or online products that are accessed by clicking "I agree" to activate the license.<sup>70</sup> Such licenses under the Act give licensors or vendors of the software product more latitude in establishing and enforcing the terms.<sup>71</sup> Although questionable or unfair terms in "shrink-wrap" and "click-wrap" licenses can be challenged by licensees in court, the courts have more often than not enforced the terms in "shrink-wrap" contracts.<sup>72</sup> UCITA takes a leap forward in validating the terms of this kind of license.<sup>73</sup> A software license includes a provision that specifies which law governs the contract and in UCITA this *choice of law* provision enables contracting parties to select Virginia or Maryland law (i.e. UCITA) to govern a software or access contract entered into by residents and businesses anywhere in the country.<sup>74</sup> UCITA also broadly allows *choice of forum* clauses that might select either Virginia or Maryland as the state where any litigation or arbitration regarding a dispute in the contract would take place.<sup>75</sup> Consequently, some states have developed "defensive legislation" to protect their residents from the non-negotiated terms of the software contracts. The measures adopted by the four

65. *Ibid.* § 103(d)(3)(B).

66. *Ibid.* § 103(d)(5).

67. *Ibid.* § 103(c); see also U.C.C. § 9-109 (2002) (stating that the Article applies to any transaction that is related to the transfer of personal property interests in contract, among other things).

68. U.C.I.T.A. § 201(a)(1)(2002).

69. "UCITA & Related Legislation In Your State," American Library Association, available at: <http://www.ala.org/ala/washoff/woissues/copyrightb/ucita/states.htm>. (last accessed March 6, 2006) (hereinafter UCITA ALA).

70. "UCITA 101 & 102," American Library Association, available at: <http://www.ala.org/ala/washoff/woissues/copyrightb/ucita/ucita101.htm> (last accessed April 3, 2006) (hereinafter UCITA ALA).

71. *Ibid.*

72. *Ibid.*

73. "UCITA 101 & 102," American Library Association, available at: <http://www.ala.org/ala/washoff/woissues/copyrightb/ucita/ucita101.htm> (last accessed April 3, 2006) (hereinafter UCITA ALA).

74. *Ibid.*

75. *Ibid.*

anti-UCITA states—Iowa, North Carolina, West Virginia and, just last month, Vermont—are referred to as "bomb-shelter" legislation.<sup>76</sup> The intent is to prevent a vendor from applying Maryland or Virginia UCITA law provisions unilaterally on residents of other states, for instance.<sup>77</sup> In most cases, the "bomb-shelter" legislation narrowly states that the *choice of law* or *choice of forum* terms in software contracts is unenforceable in that state.<sup>78</sup>

UETA applies to electronic records and electronic signatures relating to transactions.<sup>79</sup> In UETA, an "electronic signature means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record."<sup>80</sup> Nevertheless, this Act does not apply to a transaction to the extent it is governed by Article 2 of the UCC or to the extent that UCITA applies.<sup>81</sup>

E-SIGN gives validity to contracts and other documents signed in electronic form and related to interstate or foreign commerce.<sup>82</sup> Nevertheless, this Act does not require any person to agree to use or accept electronic records or electronic signatures.<sup>83</sup> E-SIGN also indicates that if a statute, regulation, or other rule of law requires that information relating to a transaction be provided and made available to a consumer in writing, the use of an electronic record to provide or to make available such information satisfies the requirement that the information be in writing if the consumer has affirmatively consented to its use and has not withdrawn consent.<sup>84</sup> Additionally, E-SIGN applies to the retention of documents. In other words, when

a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be retained, that requirement is met by retaining an electronic record of the information in the contract or other record that accurately reflects the information set forth in the contract or other record; and remains accessible to all persons who are entitled to access by statute,

76. Patrick Thibodeau, "Anti-UCITA Legal Measures Outnumber State Adoptions," June 9, 2003, available at: <http://www.computerworld.com/governmenttopics/government/legislation/story/0,10801,81884,00.html>.

77. UCITA ALA.

78. *Ibid.*

79. U.E.T.A., § 3 (1999). This Act has been adopted by the following states: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, U.S. Virgin Islands, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. Uniform Law Commissioners, A Few Facts About the Uniform Electronic Transactions Act, at [http://www.nccusl.org/nccusl/uniformact\\_factsheets/uniformacts-fs-ueta.asp](http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ueta.asp) (last visited Apr. 2, 2006).

80. U.E.T.A., § 2(8) (1999).

81. *Ibid.* § 3(b)(2)-(3).

82. 15 U.S.C. § 7001(a) (2000).

83. *Ibid.* § 7001(b)(2).

84. *Ibid.* § 7001(c)(1)(A).

regulation, or rule of law.<sup>85</sup>

Alternatively, E-SIGN does not apply to "court orders or notices, or official court documents....required to be executed in connection with court proceedings."<sup>86</sup> It also does not apply to "any notice of the cancellation or termination of utility services (including water, heat, and power); default, acceleration, repossession... or the cancellation or termination of health insurance or life insurance benefits."<sup>87</sup> In states where UETA has been adopted, it can be applied and used to replace E-SIGN provisions.<sup>88</sup> Finally, E-SIGN does not apply to a contract or other record to the extent it is governed by the UCC.<sup>89</sup>

The MLEC is applicable to all types of information in the form of data messages utilized in the context of commercial activities.<sup>90</sup> The MLEC defines "data messages" as information generated, sent, received, archived or communicated by electronic, optical or similar means.<sup>91</sup> Such a definition includes all communication not on paper<sup>92</sup> with "the fundamental principle that data messages should not be discriminated against, i.e., that there should be no disparity of treatment between data messages and paper documents."<sup>93</sup>

Additionally, the "commercial activities" contemplated by MLEC encompass all "matters arising from all relationships of a commercial nature, whether contractual or not,"<sup>94</sup> either domestic or international.<sup>95</sup> Commercial contracts include, but are not limited to, buying and selling of commercial goods and services, leasing, distribution, commercial representation, insurance, and industrial cooperation agreements.<sup>96</sup> On the other hand, the non-contractual transactions, those to which the MLEC refers, includes transactions between "users of the electronic commerce" and "public authorities".<sup>97</sup>

The field of application of the CUECIC is different than that of MLEC. CUECIC applies to "electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States."<sup>98</sup> In CUECIC, "electronic communications" cover any "statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract,"<sup>99</sup> created

85. 15 U.S.C. § 7001(d)(1)(A) – (B) (2000).

86. *Ibid.* § 7003(b)(1).

87. *Ibid.* § 7003(b)(2)(A)–(C).

88. *Ibid.* § 7002(a)(1).

89. *Ibid.* § 7003(a)(3).

90. MLEC Art. 1 (1996).

91. *Ibid.* Art. 2(a).

92. *Ibid.* ¶ 24.

93. *Ibid.* ¶ 46.

94. *Ibid.* Art. 1, footnote.

95. *See id.* ¶ 28-29.

96. *Ibid.* Art. 1, footnote.

97. *See id.* ¶ 26.

98. CUECIC art. 1(1) (2005).

99. *Ibid.* Art. 4(a).

through "data messages,"<sup>100</sup> which contain all "information generated, shipped, received or stored by electronic, magnetic, optic or similar means".<sup>101</sup> It should be noted that CUECIC adopts the definition of "electronic communications" previously established in the MLEC. Nevertheless, CUECIC excludes electronic communications related to "contracts created with a personal, family or household purposes;"<sup>102</sup> certain operations related to stock market values, titles or financial stocks;<sup>103</sup> and transferable documents or titles.<sup>104</sup>

On the other hand, the requirement that the parties be established in different countries resembles the CISG.<sup>105</sup> In fact, CUECIC applies only when the party's businesses are located in participating contracting nations, or when the parties have agreed on what state law will be applicable.<sup>106</sup> Therefore, CUECIC limits the area of application to parties that maintain, in different nations, "a nontransitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location".<sup>107</sup> Article 6 of CUECIC also reiterates two rules from article 10 of CISG in reference to multiple establishments and the place of residence when it pertains to physical people.<sup>108</sup> In addition, article 6 of CUECIC establishes presumptions based on the understanding that the parties will contract according to their location, and on the location of technology and systems of information utilized by one of the parties in the formation of a contract.<sup>109</sup>

Although CUECIC applies to the use of electronic communications in connection with the formation or performance of a contract between parties with places of business in different States,<sup>110</sup> "the fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between the parties or from information disclosed by the parties at any time before or at the conclusion of the contract."<sup>111</sup> Additionally, "neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration" in determining the establishment of the parties in different countries.<sup>112</sup> Nations contracting under CUECIC can exclude the area of its application "in a statement written according to article 21".<sup>113</sup> In this manner,

100. *Ibid.* Art. 4(b).

101. *Ibid.* Art. 4(c).

102. *Ibid.* Art. 2(1)(a).

103. *Ibid.* Art. 2(1)(b).

104. *Ibid.* Art. 2(2).

105. *See* Martin, note 8, at 265.

106. CUECIC Art. 19(1) (2005). *See also* Martin, note 8 at 269.

107. *Ibid.* Art. 4(h).

108. *Ibid.* Art. 6. *See also* Martin, note 8 at 261.

109. CUECIC art. 6 (2005). *See also* Martin, note 8 at 270.

110. *Ibid.* Art. 1(1).

111. *Ibid.* Art. 1(2). *See also* Martin, note 8 at 269.

112. CUECIC Art. 1(3) (2005).

113. *Ibid.* 19(2).

the contracting nations will be able to avoid the area of application of the CUECIC through "another convention, treaty or international agreement, mentioned explicitly in paragraph 1 of article 20".<sup>114</sup> On the other hand, through a statement in conformity with article 21, any country will be able to apply the dispositions of the current CUECIC in the employment of electronic communications in the formation or fulfillment of a contract to which some covenant, treaty or international agreement will be applicable and which said State is or can come to be a party.<sup>115</sup> Finally, "Any State may declare that it will not apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of a contract to which any international convention, treaty or agreement specified in that State's declaration, to which the State is or may become a Contracting State, applies, including any of the conventions referred to in paragraph 1 of this article, even if such State has not excluded the application of paragraph 2 of this article by a declaration made in accordance with article 21."<sup>116</sup>

### III. AUTONOMY OF THE PARTIES (EXCLUSIONS, EXCEPTIONS, AND MODIFICATIONS)

Article 2 of the UCC does not contain any provision explicitly stating how to exclude its application in transactions involving goods. However, Article 1 indicates that, when a transaction bears a reasonable relation to one state and also to another state or nation, the parties may agree that the law of either state or nation shall govern their rights and duties.<sup>117</sup> "Failing such an agreement, [the UCC] applies to transactions bearing an appropriate relation to th[e] state."<sup>118</sup> Additionally,

the effect of the provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations

114. *Ibid.* 20(2).

115. *Ibid.* 20(3).

116. *Ibid.* 20(4); *See also* id. 20(1) (the conventions are: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958); Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) and Protocol thereto (Vienna, 11 April 1980); United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980); United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 19 April 1991); United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 11 December 1995); and United Nations Convention on the Assignment of Receivables in International Trade (New York, 12 December 2001)).

117. U.C.C. § 1-105(1) (2002).

118. *Ibid.*

is to be measured if such standards are not manifestly unreasonable.<sup>119</sup>

Similarly, the CISG allows the parties to exclude its application or to vary the effect of any of its provisions.<sup>120</sup>

UCITA also gives the parties the option to choose and apply this law to their transactions unless a rule within that jurisdiction forbids it.<sup>121</sup> The Act indicates that this "choice is not enforceable in a consumer contract to the extent it would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law would apply. . . in the absence of the agreement."<sup>122</sup> UCITA also determines which jurisdiction's law governs in all respects for purposes of contract law "in the absence of an enforceable agreement on choice of law."<sup>123</sup>

UETA is a little more general in its provisions with regard to its application. For example, UETA makes clear that it "does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means."<sup>124</sup> UETA indicates that its application is purely voluntary and depends on mutual agreement between the parties to conduct transactions by electronic means.<sup>125</sup> It also indicates that "[w]hether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct."<sup>126</sup> UETA also indicates that, even when a party has agreed to conduct transactions by electronic means, that party may refuse to conduct other transactions by electronic means.<sup>127</sup> Further, "the right[s] granted by this provision may not be waived by agreement."<sup>128</sup> Generally, most provisions of UETA may vary by agreement.<sup>129</sup>

E-SIGN does not "require any person to agree to use or accept electronic records or electronic signatures, other than a governmental agency with respect to a record other than a contract to which it is a party."<sup>130</sup> Also, E-SIGN indicates that when "a statute, regulation, or other rule of law requires that information relating to a transaction or transactions . . . [be] made available . . . in writing, the use of an electronic record to provide or make available . . . such information satisfies the requirement that such information be in writing if" the consumer consents.<sup>131</sup>

119. *Ibid.* § 1-102(3).

120. C.I.S.G., Art. 6 (1980).

121. U.C.I.T.A. § 109(a) (2002).

122. *Ibid.*

123. U.C.I.T.A. § 109(b) (2002).

124. U.E.T.A. § 5(a) (1999).

125. *See id.* § 5(b).

126. *Ibid.*

127. *Ibid.* § 5(c).

128. *Ibid.*

129. *Ibid.* § 5(d).

130. 15 U.S.C. § 7001(b)(2) (2000).

131. *Ibid.* § 7001(c)(1)(A).



MLEC is similar to CUECIC in that it permits the contracting parties to modify the dispositions established in the contract.<sup>132</sup> In the case of the MLEC, the autonomy of the parties is limited explicitly to the dispositions not related to the requirements of establishing the effectiveness and validity of "writings", "signatures", and "originals" transmitted through electronic data messages.<sup>133</sup> On the other hand, CUECIC does not explicitly limit the autonomy of the parties,<sup>134</sup> thus it is nevertheless very probable that the Commission of the United Nations for International Commercial Rights would interpret said autonomy in a similar manner as MLEC.<sup>135</sup>

#### IV. FORMATION OF THE ELECTRONIC CONTRACT

##### A. The Offer

An offer can be defined as "a declaration of receptive intent, which being sufficiently definite, aims toward the perfection of the contract by means of the concurrence with the statement of the recipient of the proposal."<sup>136</sup> The absence of any of these elements implies that existence of the contract cannot be established or perfected.<sup>137</sup>

The 2003 amended version of the UCC establishes that an offer by a merchant to buy or sell goods in a signed *record* that by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may the period of irrevocability exceed three months. Any such term of assurance in a form supplied by the offeree must be separately signed by the offeror.<sup>138</sup>

With regard to the element of the offer, the UCC also indicates "an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances."<sup>139</sup> Additionally, the UCC explains that "an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods, but the shipment of nonconforming goods is not an acceptance if the

132. See MLEC Art. 3 (1996); CUECIC Art. 3 (2005).

133. MLEC Art. 4(1) (1996).

134. CUECIC Art. 4 (2005).

135. See MLEC ¶ 21 and 44 (1996); see also Martin, note 8, p. 289.

136. M.a del Pilar Perales Viscasillas, *Formación del Contrato Electrónico*, in *RÉGIMEN JURÍDICO DE INTERNET* 875, 886-87 (Javier Cremades et al. eds. 2002).

137. The term "perfection" in this article is used to describe the consummation or execution of a contract without defect. Although more commonly used in the field of secured transactions, the term was chosen as a more accurate description of the act of fulfilling all legal requirements for the formation of a contract.

138. U.C.C. §2-205 (2003).

139. *Ibid.* § 2-206(1)(a).

seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer."<sup>140</sup>

With regard to the offer, the CISG considers that a "proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance."<sup>141</sup> Such a proposal is "sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provisions for determining the quantity and the price."<sup>142</sup> Such "an offer becomes effective when it reaches the offeree" but can be withdrawn, even if irrevocable, "if the withdrawal reaches the offeree before or at the same time as the offer."<sup>143</sup> "An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror."<sup>144</sup> Also, any offer can be revoked until the contract is concluded, so long as "the revocation reaches the offeree before he has dispatched an acceptance."<sup>145</sup> However, "an offer cannot be revoked if it indicates, whether by stating a fixed time for its acceptance or otherwise, that it is irrevocable; or if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer."<sup>146</sup>

With regard to an offer, UCITA indicates "an offer to make a contract invites acceptance in any manner and by any medium reasonable under the circumstances" unless otherwise unambiguously indicated by the language or the circumstances.<sup>147</sup> "An order or other offer to acquire a copy for prompt or current delivery invites acceptance by either a prompt promise to ship or a prompt or current shipment of a conforming or nonconforming copy."<sup>148</sup> An offer, like an acceptance, "is conditional if it is conditioned on agreement by the other party to all the terms of the offer or acceptance."<sup>149</sup> At the same time, "a conditional offer or acceptance precludes formation of a contract unless the other party agrees to its terms."<sup>150</sup>

UETA does not include any rules or terms specifically related to the offer; it only authorizes the use of records or electronic signatures in the formation of contracts.<sup>151</sup>

Similarly, the legal effect of E-SIGN is limited to the use of electronic signatures, contracts, or other records affecting interstate or foreign commerce.<sup>152</sup> However, E-SIGN does not affect any other rule or law that

140. *Ibid.* § 2-206(1)(b).

141. C.I.S.G. Art. 14(1) (1980).

142. *Ibid.*

143. *Ibid.* Art. 15(1)-(2).

144. *Ibid.* Art. 17.

145. *Ibid.* Art. 16(1).

146. *Ibid.* Art. 16(2)(a)-(b).

147. U.C.I.T.A. § 203(1) (2002).

148. *Ibid.* § 203(2).

149. *Ibid.* § 205(a).

150. *Ibid.* § 205(b).

151. See U.E.T.A. §§ 2(16), 3(a), 4 (1999).

152. See 15 U.S.C. § 7001(a).

regulates the formation of contracts except to allow for the use of electronic medium for its formation.<sup>153</sup> This Act indicates that it does not "affect the content or timing of any disclosure or other record required to be provided or made available to any consumer under any statute, regulation, or other rule of law."<sup>154</sup> Both MLEC and CUECIC do not have objectives to provide rules or dispositions that establish the validity of a contract. MLEC expresses how a party can make an offer by reinforcing the principle that recognizes "the legal validity of data messages" as probative evidence, but it does not establish the validity of a contract.<sup>155</sup> Therefore, MLEC does not intend to interfere with the domestic laws of each State in regards to the formation of contracts, but strives instead "to promote greater international trade giving legal certainty to the formation of contracts by electronic media".<sup>156</sup>

CUECIC, in turn, only describes an offer at the formation of a contract as a compilation of "every exposition, statement, claim, notice or request...that the parties should or will do".<sup>157</sup> Nevertheless, CUECIC indicates with specificity that offers to form a contract sent to all the users of a system of electronic information are invitations to make an offer, unless the party making such an offer promises to become obligated shall he receive an acceptance.<sup>158</sup> In that case, a party can become obligated to perform if an acceptance is received when the offer is for merchandise bought and sold through Internet auctions.<sup>159</sup>

### B. The Acceptance

The acceptance can be defined as "a manifestation of will by which the offeree shows agreement with the offer."<sup>160</sup> The law appears to recognize three acceptable ways of accepting an offer: expressly accepting, impliedly accepting, or tacitly accepting through the silence or inaction of the offeree. It would be convenient to mention that the statutes of various countries consider that any consent through electronic means falls within the expressed declarations of intent.<sup>161</sup>

In accordance with the UCC, an acceptance can be accomplished in any manner and by any medium reasonable under the circumstances.<sup>162</sup> The "shipment of nonconforming goods is not an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the

153. See *Ibid.* § 7001(a)(1).

154. *Ibid.* § 7001(c)(2)(A).

155. See MLEC Art. 11; MLEC ¶ 77 (1996).

156. MLEC ¶ 76 (1996).

157. CUECIC Art. 4(a) (2005).

158. *Ibid.* Art. 11.

159. Martin, note 8, at 295.

160. Viscasillas, note 95, at 902.

161. *Ibid.* at 902-03.

162. U.C.C. § 2-206(1)(a) (2003).

buyer."<sup>163</sup> With regard to acceptance of the offer, the pre-2003 revision of the UCC also indicated that a definite and seasonable acceptance or a written confirmation sent within a reasonable time is considered valid even if "it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms."<sup>164</sup> The previous version of Article 2 recognized that parties typically intend to be bound to a contract, notwithstanding different or additional boilerplate terms. It resolved the battle of the forms by finding a contract. If the seller's additional terms were considered to be material alterations of the purchase order, they would not become part of the contract. The amended version seeks to overcome these uncertainties by simply stating that any different or additional term appearing in only one of the parties' records will not become part of the contract unless the parties have otherwise agreed to such a term (whether appearing in a record or not).<sup>165</sup> Because the new version has not been enacted by some state legislatures, it is again wise to check with the state statute for the latest law regarding the applicability of additional terms to a contract. Another revision to the UCC includes an extension of the concept of cure. Where a buyer rejects goods because they are nonconforming, the previous Article 2 allowed the seller to cure the defect by repairing or replacing the goods, assuming the time for delivery had not passed under the contract. By its terms, however, the cure section only applied if the buyer rejected the goods.<sup>166</sup> If the buyer accepted the goods but later discovered defects, the buyer was entitled to revoke its acceptance of the goods, but the seller was not entitled to cure because once acceptance occurs, cure was not allowed.<sup>167</sup> The new version allows the seller to cure defects even after the buyer has revoked acceptance of the goods if time for performance remains under the contract.<sup>168</sup> In both the original and revised versions, more time for cure is permitted if the seller has reasonable grounds to believe that it would still be entitled to cure after the original contract time expires. This would typically be based on the prior dealings between the parties.<sup>169</sup>

Still, according to the Official Comments of the UCC, terms of a contract may be found not only in the consistent terms of records of the parties but also from a straightforward acceptance of an offer, and an expression of acceptance accompanied by one or more additional terms might demonstrate the offeree's agreement to the terms of the offer.<sup>170</sup> If, for example, a buyer transmits a

163. *Ibid.* § 2-206(1)(b).

164. *Ibid.* § 2-207(1) (2003).

165. *Ibid.*

166. Dr. John Murray, Jr., *What's New in UCC Article 2*, November 6, 2003, available at <http://www.purchasing.com/article/CA337305.html>.

167. *Ibid.*

168. Dr. John Murray, Jr., *What's New in UCC Article 2*, November 6, 2003, available at <http://www.purchasing.com/article/CA337305.html>.

169. *Ibid.*

170. U.C.C. § 2-207, official cmt. 3 (2003).

purchase order with certain technical specifications and the seller responded to the purchase order with a record stating, "We appreciate for your order. We will fill it promptly. Note that we do not make deliveries after 1:00 p.m. on Fridays." it might be reasonable to conclude that both parties agreed to the technical specifications.<sup>171</sup> Similarly, an offeree's performance is sometimes determinative of acceptance of an offer.<sup>172</sup> For example, if a buyer transmits a purchase order and there is no oral or other agreement, yet the seller delivers the goods in response to the purchase order-but the seller does not send the seller's own acknowledgment or acceptance-the seller should normally be viewed as having agreed to the terms of the purchase order.<sup>173</sup> If, however, parties to a transaction transmit records with conflicting or inconsistent terms, but conduct by both parties recognizes the existence of a contract, subsection (a) provides that the terms of the contract are terms that appear in the records of both parties.<sup>174</sup> But even when both parties transmit records, there may be nonverbal agreement to additional or different terms that appear in only one of two records.<sup>175</sup> If, for example, both parties' forms called for the sale of 500,000 widgets but the purchase order or another record of the buyer conditioned the sale on a test of a sample to see if the widgets would perform properly, the seller's sending a small sample to the buyer might be construed to be an agreement to the buyer's condition.<sup>176</sup> It might also be found that the contract called for dispute resolution by arbitration when both forms provided for arbitration but each record contained immaterially different arbitration provisions.<sup>177</sup>

In rare instances the terms in the records of both parties might not become part of the contract.<sup>178</sup> This could be the case, for example, when the parties to the negotiation contemplated an agreement to a single negotiated record, and each party submitted to the other party similar proposals and then began performance, but the parties never reached a final negotiated agreement because there were differences over crucial contract terms.<sup>179</sup> There is a variety of verbal and nonverbal behavior that may suggest agreement to another's record, but the amended §2-207 section leaves the interpretation of that behavior to the discretion of the courts.<sup>180</sup>

With regard to acceptance, the CISG indicates that an acceptance can be "a statement made by or other conduct of the offeree indicating assent to an offer . . . ."<sup>181</sup> However, in situations where the parties have previously carried

171. *Ibid.*

172. *Ibid.*

173. *Ibid.*

174. *Ibid.*

175. U.C.C. §2-207, official cmt. 3 (2003).

176. *Ibid.*

177. *Ibid.*

178. *Ibid.*

179. *Ibid.*

180. U.C.C. §2-207, official cmt. 3 (2003).

181. C.I.S.G. art. 18(1) (1980).

out several contracts between them, courts have decided that not objecting to a certain term is a valid acceptance.<sup>182</sup>

An acceptance becomes effective at the moment it reaches the offeror so long as acceptance occurs within the terms indicated in the contract, or if the contract does not establish a definite period, a reasonable time under the circumstances.<sup>183</sup> In some cases "the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror . . ." and as a result of the established practices or usage.<sup>184</sup> The preceding would become effective at the moment the acceptance is performed, provided it is performed within the period of time laid down or, if no deadline is set, within a reasonable time.<sup>185</sup>

The CISG also indicates "a late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect."<sup>186</sup> An exception to this is if the offeror informs the offeree without an unjustifiable delay that the offer has lapsed.<sup>187</sup>

With regard to the acceptance, UCITA indicates that

a person manifests assent to a record or term if the person, acting with knowledge of, or after having an opportunity to review the record or term . . . , authenticates the record or term with intent to adopt or accept it; or intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.<sup>188</sup>

Basically, the same requirements apply to acceptance through an electronic agent.<sup>189</sup>

UETA states "if the beginning of a requested performance is a reasonable mode of acceptance, an offeror that is not notified of acceptance or performance within a reasonable time may treat the offer as having lapsed before acceptance."<sup>190</sup> "If an offer in an electronic message evokes an electronic message accepting the offer, a contract is considered formed; when an electronic acceptance is received; or . . ." if the response consists of beginning or full performance, when the performance is received.<sup>191</sup>

182. See Nakata, note 42, at 156.

183. C.I.S.G. Art. 18(2) (1980).

184. *Ibid.* Art. 18(3).

185. *Ibid.* Art. 18(2)-(3).

186. *Ibid.* Art. 21(1).

187. See *id.* Art. 21(2).

188. U.C.I.T.A. § 112(a)(1)-(2) (2002).

189. Compare *id.* § 112(b)(1)-(2) (limiting assent through an electronic agent to situations where the agent either authenticates the record or performs operations that indicate acceptance), with *id.* § 112(a)(1)-(2) (limiting assent through a person to situations where the person either authenticates the record or engages in conduct that indicates assent).

190. *Ibid.* § 203(3).

191. *Ibid.* § 203(4).

Under UETA, an electronic record is received when "it enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record."<sup>192</sup> An electronic record is received "even if no individual is aware of its receipt."<sup>193</sup>

E-SIGN establishes that when a statute, regulation, or other rule of law requires information relating to a transaction be made available in writing, the consumer should affirmatively consent to the use of an electronic record.<sup>194</sup> Before consenting to the application of this law, the consumer should receive a clear and conspicuous statement informing the consumer of any right or option to have the record provided or made available on paper or in non-electronic form, and of his right to withdraw his consent to the use of electronic means in his transactions.<sup>195</sup>

MLEC and CUECIC do not express any dispositions or specific definitions of acts or omissions that constitute acceptance of an offer made by another party. MLEC only directs that a party can accept an offer in the context of the formation of the contract through a data message.<sup>196</sup> Nevertheless, this disposition should not be understood as an obligation to use electronic data messages for parties that prefer physical written contracts.<sup>197</sup> CUECIC, on the other hand, only describes the acceptance of an offer during the formation of a contract as a compilation of "every exposition, statement, claim, notice or request...that the parts should do or decide to do".<sup>198</sup> MLEC seeks to reinforce the principle recognizing "the legal effectiveness of data messages" as probative value but does not establish the validity of a contract.<sup>199</sup> Therefore, MLEC intends not to interfere with the internal laws of each country whereas such laws pertain to formation of contracts, but to "promote international trade by providing increased legal certainty as to the conclusion of contracts by electronic means".<sup>200</sup>

### C. Contract Closure

For electronic contracts, independent of the civil or commercial nature of the contract and its national or international scope of application, reception theory determines the moment the contract closes. These rules are a result of study and analysis of contract perfection in various national statutes, such as the CISG,

192. U.E.T.A § 15(b) (1999).

193. *Ibid.* § 15(e).

194. 15 U.S.C. § 7001(c)(1)(A) (2000).

195. *Ibid.* § 7001(c)(1)(B)(i).

196. MLEC Art. 11 (1996).

197. *Ibid.* ¶ 79.

198. CUECIC Art. 4(a) (2005).

199. MLEC ¶ 77 (1996).

200. *Ibid.* ¶ 76.

and of the fact that contract criteria today is universally accepted.<sup>201</sup> The revised UCC indicates that "a contract for sale of goods may be made in any manner sufficient to show agreement, including offer and acceptance, conduct by both parties which recognizes the existence of a contract, the interaction of electronic agents, and the interaction of an electronic agent and an individual."<sup>202</sup> This law indicates "an agreement sufficient to constitute a contract for sale may be found even if the moment of its making is undetermined."<sup>203</sup> The UCC goes further in sustaining contract creation by indicating that, "even if one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."<sup>204</sup> Of special note is the specific inclusion in revised Article 2 of electronic agents. Except as otherwise provided in §2-211 through §2-213, "a contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements."<sup>205</sup> Further, "a contract may be formed by the interaction of an electronic agent and an individual acting on the individual's own behalf or for another person. A contract is formed if the individual takes actions that the individual is free to refuse to take or makes a statement, and the individual has reason to know that the actions or statement will [either] cause the electronic agent to complete the transaction or performance or indicate acceptance of an offer, regardless of other expressions or actions by the individual to which the electronic agent cannot react."<sup>206</sup> The CISG requires more before granting validity to a contract. Generally, the CISG requires an offer and a valid acceptance before a contract is created. The contract is not valid until it has been perfected, and it is perfected the moment an acceptance becomes effective in accordance with the CISG provisions.<sup>207</sup> Under the CISG, contract perfection is considered to occur when any "declaration of acceptance or any other indication of intention 'reaches' the addressee when it is made orally to him or delivered by any other means to him personally..."<sup>208</sup>

UCITA similarly indicates "a contract may be formed in any manner sufficient to show agreement, including offer and acceptance or conduct of both parties or operations of electronic agents that recognize the existence of a contract."<sup>209</sup> It also indicates, in a manner similar to the UCC stipulation, that

201. Viscasillas, note 95, at 919-20. But see *id.* at 920, note 116 (noting that common law may apply either the mailbox rule or the reception theory to determine the precise moment of perfection).

202. U.C.C. § 2-204(1) (2003).

203. *Ibid.* § 2-204(2).

204. *Ibid.* § 2-204(3).

205. *Ibid.* § 2-204(4).

206. *Ibid.* § 2-204(4).

207. C.I.S.G. Art. 23 (1980).

208. *Ibid.* Art. 24.

209. U.C.I.T.A. § 202(a) (2001).



if the parties so intend, an agreement sufficient to constitute a contract may be found even if the time of its making is undetermined, one or more of its terms are left open or to be agreed on, the records of the parties do not otherwise establish a contract, or one party reserves the right to modify its terms.<sup>210</sup>

However, UCITA indicates that a contract has not been formed if there is "a material disagreement over a material term, including a term concerning scope."<sup>211</sup>

UETA provides that "a record or signature may not be denied legal effect or enforceability solely because it is in electronic form" and extends the provision to prevent contract denial solely for electronic form.<sup>212</sup> UETA also establishes that if the "parties have agreed to conduct a transaction by electronic means and a law requires a person to provide . . . information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered . . . in an electronic record capable of retention by the recipient at the time of receipt."<sup>213</sup>

E-SIGN states, "the legal effectiveness, validity, or enforceability of any contract executed by a consumer shall not be denied solely because of the failure to obtain electronic consent or confirmation of consent by that consumer."<sup>214</sup>

MLEC does not determine specifically the perfection of a contract since its main objective is to give equal legal effect to electronic messages as to traditional paper documentation.<sup>215</sup> Similar to CUECIC, MLEC establishes that electronic form of any contract will not be the sole manner by which the effectiveness or validity is proved.<sup>216</sup> Therefore, the requirements of agreements made in writing,<sup>217</sup> signatures,<sup>218</sup> and the presentation of original copies<sup>219</sup> can be satisfied through the use of electronic messages.

## V. ADDITIONAL OR DIFFERENT TERMS IN A CONTRACT

Under the pre-2003 revision version of the UCC that is law in most states, between merchants, additional terms are to be construed as proposals for addition to the contract unless: the offer expressly limits acceptance to its terms; the added terms materially alter the contract; or notification of objection to the added terms is given within a reasonable time after alteration.<sup>220</sup> The additional

210. *Ibid.* § 202(b).

211. *Ibid.* § 202(d).

212. U.E.T.A. § 7(a)-(b) (1999).

213. *Ibid.* § 8(a).

214. 15 U.S.C. § 7001(c)(3) (2000).

215. See MLEC ¶ 15-18, 46 (1996); Overby, note 7, at 222.

216. See MLEC Art. 5 (1996); CUECIC Art. 8(1) (2005).

217. MLEC Art. 6 (1996).

218. *Ibid.* Art. 7.

219. *Ibid.* Art. 8.

220. U.C.C. § 2-207(2)(a)-(c) (2003).

terms should be construed only as proposals for additions to the contract.<sup>221</sup> When the conduct of both parties establishes existence of a contract but the writings do not so indicate, the terms of the contract consist of those in agreed writings of the parties.<sup>222</sup> Still, under the revised UCC, if the conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, a contract is formed by an offer and acceptance, or a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed, the terms of the contract are: terms that appear in the records of both parties; terms, whether in a record or not, to which both parties agree; and terms supplied or incorporated under any provision of the UCC.<sup>223</sup> The CISG, in contrast, provides that "a reply to an offer that purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer."<sup>224</sup> However, if changes or additions to the offer do not materially alter the terms of the offer, acceptance is valid unless the offeror, without undue delay, objects orally to the discrepancy or sends a notice to that effect.<sup>225</sup> "If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance."<sup>226</sup> The CISG considers that "additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other, or the settlement of disputes . . . alter the terms of the offer materially."<sup>227</sup>

Similarly, UCITA states, "an acceptance materially alters an offer if it contains a term that materially conflicts with or varies a term of the offer or that adds a material term not contained in the offer."<sup>228</sup> If the acceptance materially alters the offer, a contract is not formed unless "a party agrees . . . to the other party's offer or acceptance; or all the other circumstances, including the conduct of the parties, establish a contract."<sup>229</sup> "If an acceptance varies from but does not materially alter the offer, a contract is formed based on the terms of the offer."<sup>230</sup> Additionally, the "terms in the acceptance which conflict with terms in the offer are not part of the contract."<sup>231</sup> "An additional nonmaterial term in the acceptance is a proposal for an additional term."<sup>232</sup> Furthermore, UCITA indicates, "between merchants, the proposed additional term becomes part of the

221. *Ibid.* § 2-207(2).

222. *Ibid.* § 2-207(3).

223. *Ibid.* § 2-207.

224. C.I.S.G. Art. 19(1) (1980).

225. *Ibid.* Art. 19(2).

226. *Ibid.*

227. *Ibid.* Art. 19(3).

228. U.C.I.T.A. § 204(a) (2002).

229. *Ibid.* § 204(c)(1)(A)-(B).

230. *Ibid.* § 204(d).

231. *Ibid.* § 204(d)(1).

232. *Ibid.* § 204(d)(2).

contract unless the offeror gives notice of objection before, or within a reasonable time after, it receives the proposed terms."<sup>233</sup>

According to UETA, "the effect of any of its provisions may be varied by agreement."<sup>234</sup> Although E-SIGN does not contain any specific terms with regard to exchange of additional or different elements of the contract, E-SIGN does indicate that its application does not limit, alter, or otherwise affect any requirement imposed by a statute, regulation or rule of law.<sup>235</sup>

MLEC does not establish any dispositions or rules related to additional or different terms of the contract because it seeks to reinforce the principle that recognizes "the legal effectiveness of data messages" as probative evidence but not to establish the validity of a contract.<sup>236</sup> On the other hand, the CUECIC foresees the possibility of errors in electronic communications between parties, in which a physical person commits an error while entering electronic data in an automated system without allowing the other party the opportunity to correct the error.<sup>237</sup> In this case, the physical person has the right to withdraw the erroneous portion of the electronic message if the error is reported to the other party as soon as possible, or if the party that made the mistake was not materially enriched because of the error.<sup>238</sup> CUECIC defers to the domestic laws of the State in the event that errors in the broadcast of data result for other reasons than errors caused by the introduction of data by a person into an automated system.<sup>239</sup>

## VI. FORMS AND EVIDENCE OF A CONTRACT

Some of the laws discussed here, though giving the parties ample liberty to establish the terms and requirements of their contracts, also require certain elements to be present in order to make a valid contract. Under the 2003 revised version of the UCC, for example, the law requires that any contract for the sale of goods for \$5,000 or more be in a record and indicate at least the quantity because, in the event of a disagreement, a transaction is not considered valid for more its indicated value even though the writing is not considered insufficient just because it omits or incorrectly states an agreed upon term;<sup>240</sup> this provision is known as the statute of frauds.<sup>241</sup> However, the UCC also permits parties to contract for sale even when the price is not settled.<sup>242</sup> In such cases, the court may determine what is a reasonable price under the contract by taking into

233. *Ibid.*

234. U.E.T.A. § 5(d) (1999).

235. 15 U.S.C. § 7001(b)(1) (2000).

236. MLEC ¶ 77 (1996).

237. CUECIC Art. 14(1) (2005); Martin, note 8, at 296.

238. CUECIC Art. 14(1)(a)-(b) (2005).

239. *Ibid.* Art. 14(2); Martin, note 8, at 296.

240. U.C.C. § 2-201(1) (2003).

241. *Id.*

242. *Ibid.* § 2-305(1).

account the market value of the goods.<sup>243</sup>

Under the UCC, a record between merchants to confirm a contract, it is sufficient to form that contract if it is received within a reasonable time and if the receiving party has reason to know its contents, unless a notice of objection to its contents is given in a record within ten days after it is received.<sup>244</sup>

The CISG does not require a contract of sale to be concluded in or evidenced by writing and is not subject to any other form requirement. The existence and validity of the contract "may be proved by any means, including witnesses."<sup>245</sup> The states whose legislatures require that contracts for the sale of goods be evidenced in writing may make a declaration indicating that neither Article 11 nor the exception to Article 29 will apply where any party has his place of business in that state.<sup>246</sup> The exception to Article 29 provides that, if a written contract contains a provision requiring any modification or termination to be in writing, it may not be otherwise modified or terminated by agreement.<sup>247</sup> "However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct."<sup>248</sup>

UCITA is a little stricter. This law indicates that any contract requiring payment of a contract fee of \$5000 or more is "not enforceable by way of action or defense unless: the party against which enforcement is sought authenticated a record sufficient to indicate that a contract has been formed."<sup>249</sup> However, a document satisfies this requirement even when "it omits or incorrectly states a term, but the contract is not enforceable beyond the number of copies or subject matter shown in the record" unless performance was tendered by one party and accepted by the other or if the party against which enforcement is sought admits in court that a contract was formed.<sup>250</sup>

Additionally, UCITA establishes that a record between merchants confirming the contract is sufficient to form the contract if it is received within a reasonable time and if the receiving party has reason to know its contents unless a written "notice of objection to its contents is given in a record within a reasonable time after the confirming record is received."<sup>251</sup> The parties can agree that "the requirements of this section need not be satisfied as to future transactions."<sup>252</sup> The statute of frauds, as in U.C.C. §2-201, of other laws does not apply to a transaction within the scope of UCITA.<sup>253</sup>

243. *Ibid.* § 2-305(1)(c).

244. *Ibid.* § 2-201(2).

245. C.I.S.G. Art. 11 (1980).

246. *Ibid.* Arts. 12, 96.

247. *Ibid.* Art. 12, 29(2).

248. *Ibid.* Art. 29(2).

249. U.C.I.T.A. § 201(a)(1) (2002).

250. *Ibid.* § 201(b), (c)(1)-(2).

251. *Ibid.* § 201(d).

252. *Ibid.* § 201(e).

253. *Ibid.* § 201(f).

Alternatively, UETA indicates "a record or signature may not be denied legal effect or enforceability solely because it is in electronic form."<sup>254</sup> It also provides that "a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation"<sup>255</sup> while E-SIGN authorizes the use of electronic signatures and records for contract formation related to interstate or foreign commerce.<sup>256</sup>

UETA also establishes that in an automated transaction, "a contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions."<sup>257</sup> In accordance with this Act,

a contract may also be formed by the interaction of an electronic agent and an individual, acting on an individual's own behalf or for another person, including by an interaction in which the individual performs actions that [he] is free to refuse to perform and which the individual knows will cause the electronic agent to complete the transaction or performance.<sup>258</sup>

Under UETA, an electronic agent "means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual."<sup>259</sup>

MLEC and CUECIC require the satisfaction of laws that call for a writing of messages received through electronic means if these can be consulted subsequently.<sup>260</sup> MLEC also requires the establishment through reliable methods, keeping in mind all the circumstances of the case, the authenticity of a signature through data messages when the domestic laws of the state require it.<sup>261</sup> Contrary to MLEC, CUECIC permits the authentication of electronic signatures with evidence indicating the party's intention in respect of the information contained in the electronic communication, either by itself or with other evidence.<sup>262</sup>

MLEC as well as CUECIC recognize as "original" an electronic communication or contract that has verified "the integrity of the information from the time when it was first generated in its final form."<sup>263</sup> The first requirement to determine the reliability of the information contained in the "original" copy depends on whether or not the form is "apart from the addition of any

254. U.E.T.A. § 7(a) (1999).

255. *Ibid.* 7(b).

256. 15 U.S.C. § 7001(a)(1) (2000).

257. U.E.T.A. § 14(1) (1999).

258. *Ibid.* § 14(2).

259. *Ibid.* § 2(6).

260. MLEC Art. 6(1) (1996); see CUECIC Art. 9(2); Martin, note 8, at 285.

261. *Ibid.* Art. 7.

262. CUECIC Art. 9(3)(b)(ii) (2005); Martin, note 8, at 285.

263. MLEC Art. 8(1)(a) (1996); see also CUECIC Art. 9(4)(a) (2005).

endorsement and any change which arises in the normal course of communication, storage and display" taking into account the purpose for which the information was generated and in the light of all the relevant circumstances.<sup>264</sup> The second requirement in verifying an "original" copy of an electronic communication or contract consists in being able to show the information to the person to which it should be presented to in the situations in which the information require to be presented.<sup>265</sup>

In regards to the probative value of electronic messages, MLEC establishes "both the admissibility of data messages as evidence in legal proceedings and their evidential value".<sup>266</sup> To evaluate the probative value of an existing contract formed by electronic messages, MLEC proposes the consideration of "the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor".<sup>267</sup>

## VII. CONSIDERATION

Consideration, as it is known in the English language, is a unique characteristic of American contract law. Although not expressly stated in statutory form, the common law indicates that a contract generally requires mutual consideration from the parties to be valid. There is no clear definition as to what consideration is. However, the courts seem to have uniformly adopted the definition suggested in *Allegheny College v. National Chautauqua County Bank*, indicating that consideration is sufficient if there is a legal detriment that induces the party to make the promise.<sup>268</sup>

One of the most controversial situations in American contracts with regard to consideration occurs when deciding if a promise alone is sufficient to form a contract. American common law uses the consideration doctrine to decide these cases. This doctrine requires that a contractual promise be made as a result of a negotiation.<sup>269</sup> Under this doctrine, negotiation refers to the voluntary acceptance of an obligation by one party conditioned upon an act or omission of the other.<sup>270</sup> Therefore, consideration assures that the promise enforced as part of the contract is not accidental, casual, or gratuitous but was made after deliberation manifested by reciprocal negotiation.<sup>271</sup>

264. MLEC Art. 8(3)(a)-(b) (1996); see also CUECIC 9(5)(a)-(b) (2005).

265. MLEC Art. 8(1)(b) (1996); see also CUECIC Art. 9(4)(b) (2005).

266. MLEC ¶ 70; see also Art. 9(1) (1996).

267. MLEC Art. 9(2) (1996).

268. See *Allegheny Coll. v. Nat'l Chautauqua County Bank of Jamestown*, 159 N.E. 173, 714 (N.Y. 1927).

269. *Baehr v. Penn-O-Tex Oil Corp.*, 104 N.W.2d 661, 665 (Minn. 1960).

270. *Ibid.*

271. *Ibid.*

The requirement of detriment indicates that the accepting party gives up something of value or circumscribes his liberty in some way.<sup>272</sup> In other words, the accepting party must suffer a legal detriment as part of the negotiation.<sup>273</sup> That is to say, the party offers its promise in exchange for what the other party sacrifices. The requirement of consideration invalidates two transactions: promises to make a gift, which do not satisfy the requirement of negotiation; and commercial promises in which one of the parties has not given consideration, even when circumstances appear to indicate otherwise.<sup>274</sup>

Although consideration plays an important role in regular contracts, in commercial transactions it is not a major concern since most commercial contracts are clearly bargained-for exchanges where the price for the promise is clearly identified.<sup>275</sup> Therefore, there are now very few cases in which a lack of consideration makes a promise unenforceable, especially in commercial transactions.<sup>276</sup>

### VIII. CONCLUSIONS

The modern era and the benefits offered by technological progress create an opportunity to carry out commercial transactions around the world with ease. At the same time, new problems and questions arise related to the appropriate manner to carry out modern transactions. Although modern law tends toward uniformity in laws and regulations of modern transactions, certain aspects of contract may still cause controversy.

One should remember that under U.S. common law the basic principle of contracts is the presumption that a contract is or is not carried out based on the decisions or actions of a person, either acting on his own behalf or someone else's. The convenience computerized communication offers threatens this basic principle because, obviously, computers do not have the capacity to think or evolve. Even then, computers can work on their own within their programmed parameters. Essentially, computers are allowed to make decisions and respond to certain situations with or without human participation.<sup>277</sup>

In purely electronic transactions, the most important legal determination concerns the establishment of an offer and an acceptance through electronic messages absent written documentation and the human intervention of an automatic exchange. Also, electronic transactions create controversies over when the offer, acceptance, or rejection is effective.<sup>278</sup>

272. *See Ibid.*

273. *Ibid.*

274. *See* E. ALLAN FARNSWORTH, *CONTRACTS* § 2.5, 2.13 (3rd ed. 1999).

275. Arthur L. Rosett, *Fundamentals of Contract Law*, in 1 *UNITED STATES LAW OF TRADE AND INVESTMENT* 3-iii, 3-13 to 3-14 (Boris Kozolchyk & John F. Molloy eds., 2001).

276. *Ibid.* at 3-14.

277. Raymond T. Nimmer, "Electronic Contracting: Legal Issues", *J. Marshall J. Computer & Info. L.* vol. 14 (1996), pp. 211, 212.

278. *Ibid.* at 214.

The means of electronic contract also create issues unique to this field in reference to the determination of whether a valid acceptance has taken place. Those issues confront the reality that U.S. common law of contracts assumes the decision to accept or reject an offer occurs through a person, through the achievement of human decisions and discretion. The common law presumes that an effective acceptance should be communicated with knowledge of the offer and with the intent to accept. However, intent is measured through objective manifestations, not subjective ones. This means that one assumes that the person responding to an offer means what his expression indicates unless circumstances clearly indicate otherwise. Therefore, in regular contract law, the excuse, "I did not mean to say what I said," does not carry much weight. Similarly, the excuse, "I did not mean to say what my computer said," might not be appropriate when characteristics of the electronic response are aimed at inducing the other party (or their computer) to believe they have formed a valid contract. Thus, the fact that a completely automatic acceptance takes place does not mean that there is not adequate acceptance of the electronic offer. In creating a contract, one deals with the apparent intention of the party establishing the electronic system of acceptance.<sup>279</sup>

279. *Ibid.*, p. 217.



1. Field of Application

U.C.C.	AMERICAN LAW			INTERNATIONAL LAW	
	E-SIGN	UCITA	UETA	CISG	MLEC
Article 2 applies to all transactions in goods with the following exceptions:  It does not apply to transactions which are intended to operate as a security transaction. (§2-102).  <i>As outlined in the 2003 amended version of the UCC, a contract for the sale of goods for the price of \$5,000 or more is not enforceable by way of action or defense unless there is some record sufficient to indicate such transaction. Because many state legislatures have not enacted the amended UCC, it is advisable to review the latest state statutory requirements, as many still adhere the necessity of a writing and a minimum value threshold of \$500. (§2-201(1)) (2003).</i>  It applies only to contracts related to the present or future sale of goods (§2-106(1)). Goods" must be both existing	Applies to contracts, records, or signatures in or affecting interstate or foreign commerce (§7001(a)).  In states where the UETA has been adopted, it can be applied and used to replace the terms of the E-SIGN (§7002(a)(1)).  It does not apply in transactions related to will, codicils, or testamentary trusts or contracts regulated by the U.C.C. (§7003(a)(1)).	This Act applies to computer information transactions related to the intention to create, modify, transfer, or authorize information in electronic form which is acquired through the use of a computer or in a way that could be processed by a computer (§§ 102(a)(10)–(11), 103(a)).  If a transaction includes computer information and goods, this Act applies to the part of the transaction involving computer information, informational rights in it, and creation or modification of it (§103(b)–(c)).  It does not apply to a financial services transaction, an	Applicable to electronic records and electronic signatures relating to a transaction (§3(a)).  Does not apply to transactions related to the creation and execution of wills, codicils, or testamentary trusts governed by Article 2 of the UCC, the UCITA, or other laws specified by the state (§3(b)).	Applicable to the sale of goods between parties whose place of business is in different states, when the States are Contracting States, or when the rules or private international law lead to the application of the law of a Contracting State. (Art. 1.1).  The fact that the parties have their place of business in different States is to be disregarded whenever this fact does not appear in the contract. (Art. 1.2)  The nationality or commercial character of the parties is not taken into consideration. (Art. 1.3).  Does not apply to sales of goods bought for personal, family, or household use; by auction; on execution or otherwise by authority of law; of stocks, shares, investment securities, negotiable instruments or money; ships, vessels, hovercrafts or	This Law applies to any kind of information in the form of a data message used in the context of commercial activities. (Art. 1).  It applies to all kinds of data messages that might be generated, stored, or communicated. The MLEC can be extended to cover uses of electronic commerce outside the commercial sphere. As such, it is also applicable to relationships between users of electronic commerce and public authorities. (¶ 26).  "In principle, the Model Law applies

1. Field of Application (cont'd)

U.C.C.	AMERICAN LAW			INTERNATIONAL LAW	
	E-SIGN	UCITA	UETA	CISG	MLEC
and identified before any interest in them may pass. Goods that are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell. The phraseology of the prior uniform statutory provision has been changed so that:  The definition of goods is based on the concept of movability and is not intended to deal with things that are not fairly identifiable as movables before the contract is performed.  Growing crops are included within the definition of goods since they are frequently intended for sale. The young animals are also included expressly in this definition since they, too, are frequently intended for sale and may be contracted for before birth. The period of gestation of domestic animals is such that the		agreement to create, audio or visual programming, employment contracts, or contracts that do not require that information be furnished as computer information (103(d)).  Generally, and with several exceptions, a contract that requires a quote of \$5,000 is not valid under this Act, unless there is a document that proves the formation of the contract (§201(a)).		aircrafts; and electricity (Art. 2).  Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the other party who ordered the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production (Art. 3(1)).  This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services (Art. 3(2)).  This Convention does not apply to the liability of the seller for death, or personal injury caused by the goods to any person (Art. 5).	to both international and domestic uses of data messages. "(¶ 28).

1. Field of Application (cont'd)

U.C.C.	AMERICAN LAW			INTERNATIONAL LAW	
	E-SIGN	UCITA	UETA	CISG	MLEC

provisions of the section on identification can apply as in the case of crops to be planted. The exclusion of "money in which the price is to be paid" from the definition of goods does not mean that foreign currency which is included in the definition of money may not be the subject matter of a sales transaction. Goods is intended to cover the sale of money when money is being treated as a commodity but not to include it when money is the medium of payment. (§2-105, official cmt., 2003).

*In transactions which include the acquisition of goods and services, this article is applied only in those cases where the main intent of the buyer is to obtain the goods.* (Perlmutter v. Beth David Hospital, 123 N.E.2d 792, 795 (N.Y. 1954)

2. Autonomy of Parts (exclusions, exceptions, and modifications)

U.C.C.	AMERICAN LAW			INTERNATIONAL LAW	
	E-SIGN	UCITA	UETA	CISG	MLEC

When a transaction occurs between two states or two nations, the two parties can agree and choose the applicable law of the state or nation that applies to the contract. If there is no such agreement, the UCC is applied (§1-301).	This law does not require the parties to agree to use electronic signatures in their transactions, with exception to government agencies with respect to a record other than a contract to which it is a party (§7001(b)(2)).	The parties in their agreement may choose the applicable law. However, the choice is not enforceable in a consumer contract to the extent it would vary a rule that may not be varied (§109(a)).	This Act applies only when the parties have agreed to carry out the transaction by electronic means but the parties may refuse to carry out other transactions in this way (§5(b)).	The parties may exclude the application of this Convention, or subject to Article 12, derogate from or vary the effect of any of its provisions (Art. 6).	As between parties involved in generating, sending, receiving, storing or otherwise processing data messages, the provisions may be varied by agreement, except those relating to the enforcement and validity of writings, signatures, and originals. (Art. 4).
Except as otherwise provided in §1-302(b) or elsewhere in UCC, the effect of provisions may be varied by agreement. Still, the obligations of good faith, diligence, reasonableness, and care prescribed by the UCC may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable. Whenever the UCC requires an action to be taken within a reasonable time, a time that is not manifestly unreasonable may be fixed by agreement. (§1-302).	If a statute, regulation, or other rule of law requires that information relating to a transaction be in writing, the consumer should expressly consent to the application of this law (§7001(c)(1)(A)).				

U.C.C.	AMERICAN LAW			INTERNATIONAL LAW	
	E-SIGN	UCITA	UETA	CISG	MLEC
<p>An offer by a merchant to buy or sell goods in a signed record that by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may the period of irrevocability exceed three months. Any such term of assurance in a form supplied by the offeree must be separately signed by the offeror. (§2-205).</p> <p>The offer should invite the acceptance of the other party in any reasonable way under the circumstances (§2-206(1)(a)).</p> <p>An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming goods. (§2-206(1)(b)).</p>	<p>This law does not contain a specific rule related to the offer, it only authorizes the use of electronic signatures or records for the formation of contracts relating to interstate or foreign commerce (§7001(a)(1)).</p>	<p>Unless otherwise unambiguously indicated by the language or the circumstances, an offer to make a contract invites acceptance in any manner and by any medium reasonable under the circumstances (§203(1)).</p> <p>An order or other offer to acquire a copy for prompt or current delivery invites acceptance by either a prompt promise to ship or a prompt or current shipment or a conforming or nonconforming copy (§203(2)).</p> <p>A conditional offer or acceptance precludes formation of a</p>	<p>This Act applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after the effective date of this Act (§4).</p>	<p>A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound if accepted. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provisions for determining the quantity and the price (art. 14).</p> <p>An offer becomes effective when it reaches the offeree (art. 15(1)).</p> <p>An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer (art. 15(2)).</p> <p>Until a contract is concluded an offer may be revoked if the revocation</p>	<p>This law is not intended to interfere with the law on formation of contracts but rather to promote international trade by providing increased legal certainty as to the conclusion of contracts by electronic means, but does not necessarily mean they can be used for the purpose of concluding valid contracts. (§ 76-77).</p> <p>In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages.</p>

U.C.C.	AMERICAN LAW			INTERNATIONAL LAW	
	E-SIGN	UCITA	UETA	CISG	MLEC
<p>An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt shipment of conforming goods (§2-206(1)(b)).</p>		<p>contract unless the other party agrees to its terms, such as manifesting assent (§205(b)).</p>		<p>reaches the offeree before or at the same time as the offer (Art. 16(1)).</p> <p>However, an offer cannot be revoked, if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer (Art. 16(2)).</p> <p>An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror (Art. 17).</p>	<p>Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose. (Art. 11).</p>

U.C.C.	AMERICAN LAW			INTERNATIONAL LAW	
	E-SIGN	UCITA	UETA	CISG	MLEC
<p>An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances (§2-206(1)(a)).</p> <p>An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods, but the shipment of nonconforming goods is not an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer. (§2-206(1)(b)).</p> <p>If (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the</p>	<p>When a statute, regulation, or other law requires that information relating to a transaction be in writing, the use of an electronic record satisfies the requirement that such information be in writing if the consumer has affirmatively consented to such use and has not withdrawn such consent (§7001(c)(1)(A)).</p> <p>Before consenting to the application of this Act, the consumer must be provided with a clear and conspicuous statement informing the consumer of any right or option of the consumer to have the record</p>	<p>A person manifests assent to a record or term if the person, acting with knowledge of, or after having an opportunity to review the record or term or a copy of it authenticates the record or term with intent to adopt or accept it (§112(a)(1)).</p> <p>If the beginning of a requested performance is a reasonable mode of acceptance, an offeror that is not notified of acceptance or performance within a reasonable time may treat the offer as having lapsed before acceptance (§203(3)).</p> <p>If an offer in an electronic message evokes an electronic message accepting the offer, a contract is</p>	<p>An electronic record is received when it enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record and it is in a form capable of being processed by that system (§15(b)).</p> <p>An electronic record is received even if no individual is aware of its receipt (§15(e)).</p>	<p>A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance (art. 18(1)).</p> <p>Silence or inactivity does not in itself amount to acceptance (art. 18(1)).</p> <p>An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror (art. 18(2)).</p> <p>However, if by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is</p>	<p>This law is not intended to interfere with the law on formation of contracts but rather to promote international trade by providing increased legal certainty as to the conclusion of contracts by electronic means, but does not necessarily mean they can be used for the purpose of concluding valid contracts. ¶ 76-77).</p> <p>In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data</p>

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<p>contract being confirmed, the terms of the contract are: (a) terms that appear in the records of both parties; (b) terms, whether in a record or not, to which both parties agree; and (c) terms supplied or incorporated under any provision of the UCC. (§2-207).</p> <p>Terms of a contract may be found not only in the consistent terms of records of the parties but also from a straightforward acceptance of an offer, and an expression of acceptance accompanied by one or more additional terms might demonstrate the offeree's agreement to the terms of the offer. (Official Comment Number 3, §2-207).</p> <p>A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms (§2-207(1)).</p>	<p>provided or made available on paper or in nonelectronic form, and the right of the consumer to withdraw the consent to have the record provided or made available in an electronic form and of any conditions, consequences, or fees in the event of such withdrawal (§7001(c)(1)(B)(i)).</p>	<p>formed when an electronic acceptance is received (§203(4)(A)).</p>		<p>performed within the period of time laid down in the preceding paragraph (Art. 18(3)).</p> <p>A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect (Art. 21(1)).</p> <p>If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect (Art. 21(2)).</p>	<p>message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose. (Art. 11).</p>



## 3(c). Formation of the Electronic Contract: Closure

U.C.C.	AMERICAN LAW			INTERNATIONAL LAW	
	E-SIGN	UCITA	UETA	CISG	MLEC
<p>A contract for sale of goods may be made in any manner sufficient to show agreement, including offer and acceptance, conduct by both parties which recognizes the existence of a contract, the interaction of electronic agents, and the interaction of an electronic agent and an individual. (§2-204(1)).</p> <p>An agreement sufficient to constitute a contract for sale may be found even if the moment of its making is undetermined. (§2-204(2)).</p> <p>Even if one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. (§2-204(3)).</p>	<p>The legal effectiveness, validity, or enforceability of any contract executed by a consumer shall not be denied solely because of the failure to obtain electronic consent or confirmation of consent by that consumer (§7001(c)(3)).</p>	<p>A contract may be formed in any manner sufficient to show agreement, including offer and acceptance or conduct of both parties or operations of electronic agents which recognize the existence of a contract (§202(a)).</p> <p>If the parties so intend, an agreement sufficient to constitute a contract may be found even if the time of its making is undetermined, one or more terms are left open or to be agreed on, the records of the parties do not otherwise establish a contract, or one party reserves the right to modify terms (§202(b)).</p> <p>In the absence of conduct or</p>	<p>A record or signature may not be denied legal effect or enforceability solely because it is in electronic form (§7(a)).</p> <p>A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation (§7(b)).</p> <p>If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not</p>	<p>A contract is perfected at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention (Art. 23).</p> <p>For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence (Art. 24).</p>	<p>Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message. (Art. 5).</p>

3(c). Formation of the Electronic Contract: Closure (Contd...)

U.C.C.	AMERICAN LAW			INTERNATIONAL LAW	
	E-SIGN	UCITA	UETA	CISG	MLEC
		<p>performance by both parties to the contrary, a contract is not formed if there is material disagreement about a material term, including a term concerning scope (§202(d)).</p>	<p>capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record (§8(a)).</p>		

4. Terms Additional or Different from the Contract

U.C.C.	AMERICAN LAW			INTERNATIONAL LAW	
	E-SIGN	UCITA	UETA	CISG	MLEC
<p>According to the amended UCC, if (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed, the terms of the contract are: (a) terms that appear in the records of both parties; (b) terms, whether in a record or not, to which both parties agree; and (c) terms supplied or incorporated under any provision of this Act. (§2-207).</p> <p>Terms of a contract may be found not only in the consistent terms of records of the parties but also from a straightforward acceptance of an offer, and an expression of</p>	<p>Not applicable on this issue, but it does indicate that this Act does not limit, alter, or otherwise affect any requirement imposed by a statute, regulation, or rule of law relating to the rights and obligations of persons under such law. (§7001(b)(1)).</p>	<p>A definite and seasonable expression of acceptance operates as an acceptance, even if the acceptance contains terms that vary from the terms of the offer, unless the acceptance materially alters the offer. (§204(b)).</p> <p>If an acceptance materially alters the offer, a contract is not formed unless a party agrees to the other party's offer or acceptance or all the other circumstances, including the conduct of the parties, establish a contract. (§204(c)).</p> <p>If an acceptance varies from but does not materially alter the offer, a contract</p>	<p>The effect of any of this Act's provisions may be varied by agreement. (§5(d)).</p>	<p>A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer. (Art. 19(1)).</p> <p>However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. (Art. 19(2)).</p>	<p>This law is not intended to interfere with the law on formation of contracts but rather to promote international trade by providing increased legal certainty as to the conclusion of contracts by electronic means, but does not necessarily mean they can be used for the purpose of concluding valid contracts. (§ 76-77).</p>

4. Terms Additional or Different from the Contract (Contd...)

U.C.C.	AMERICAN LAW			INTERNATIONAL LAW	
	E-SIGN	UCITA	UETA	CISG	MLEC
<p>acceptance accompanied by one or more additional terms might demonstrate the offeree's agreement to the terms of the offer. (Official Comment Number 3, §2-207).</p> <p>Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. (§2-207(3)).</p>		<p>is formed based on the terms of the offer but the terms in the acceptance which conflict with the terms in the offer are not part of the contract and an additional nonmaterial term in the acceptance is a proposal for an additional term. (§204(d)).</p>		<p>Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially. (art. 19(3)).</p>	

## 5. Form and Evidence of the Contract

U.C.C.	AMERICAN LAW			INTERNATIONAL LAW	
	E-SIGN	UCITA	UETA	CISG	MLEC
<p>Pursuant to the revised UCC, a contract for the sale of goods for the price of \$5,000 or more is not enforceable by way of action or defense unless there is some record sufficient to indicate that a contract for sale has been made between the parties and signed by the party against which enforcement is sought or by the party's authorized agent or broker. A record is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable under the UCC §2-201(1) beyond the quantity of goods shown in the record. (§2-201(1)) (This provision is known as the Statute of Frauds).</p> <p>A contract that does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable: (a) if the goods are to be specially</p>	<p>Authorizes the use of electronic signatures and record for the formation of contracts related with interstate or foreign commerce (§7001(a)(1)).</p>	<p>A record is sufficient even if it omits or incorrectly states a term, but the contract is not enforceable under that subsection beyond the number of copies or subject matter shown in the record (§201(b)).</p> <p>A contract that does not satisfy the requirements is nevertheless enforceable if a performance was tendered or the information was made available by one party and the tender was accepted or the information accessed by the other (§201(c)).</p> <p>Between merchants, a document received within a reasonable time in confirmation of the contract and of</p>	<p>A record or signature may not be denied legal effect or enforceability solely because it is in electronic form (§7(a)).</p> <p>A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation (§7(b)).</p>	<p>A contract of sale need not be perfected in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses (Art. 11).</p> <p>A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct (Art. 29(2)).</p> <p>Any provision of article 11, or article 29 of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance</p>	<p>Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference. (Art. 6(1)).</p> <p>Where the law requires a signature of a person, that requirement is met in relation to a data message if: (a) <i>a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and (b) that method is as reliable as was appropriate for the purpose for which</i></p>

## 5. Form and Evidence of the Contract (Contd...)

U.C.C.	AMERICAN LAW			INTERNATIONAL LAW	
	E-SIGN	UCITA	UETA	CISG	MLEC
<p>manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances that reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; (b) if the party against which enforcement is sought admits in the party's pleading, or in the party's testimony or otherwise under oath that a contract for sale was made, but the contract is not enforceable under this paragraph beyond the quantity of goods admitted; or (c) with respect to goods for which payment has been made and accepted or which have been received and accepted. (§2-201(3)).</p>		<p>which the receiving party has reason to know its contents, is sufficient to form a contract unless notice of objection to its contents is given in a record within a reasonable time after the confirming record is received (§201(d)).</p> <p>An agreement that the requirements of this section need not be satisfied as to future transactions is effective if evidenced in a record authenticated by the person against which enforcement is sought (§201(e)).</p> <p>A transaction within the scope of this Act is not subject to a statute of frauds contained in another law of this State (§201(f)).</p>		<p>or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a contracting State which has made a declaration under this Convention (Art. 12).</p>	<p>the data message was generated or communicated in the light of all the circumstances, including any relevant agreement. (Art. 7).</p> <p>Where the law requires information to be presented or retained in its original form, that requirement is met by a data message if: (a) <i>there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and (b) where it is required that information be presented, that</i></p>

5. Form and Evidence of the Contract (Contd...)

U.C.C.	AMERICAN LAW			INTERNATIONAL LAW	
	E-SIGN	UCITA	UETA	CISG	MLEC
Between merchants if within a reasonable time a record in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against the recipient unless notice of objection to its contents is given in a record within 10 days after it is received. (§2-201(2)). The parties if they so intend may conclude a contract for sale even if the price is not settled. (§2-305(1)).					information is capable of being displayed to the person to whom it is to be presented. (art. 8(1)).

5. Form and Evidence of the Contract (Contd...)

U.C.C.	AMERICAN LAW			INTERNATIONAL LAW	
	E-SIGN	UCITA	UETA	CISG	MLEC
Contracts should be backed by certain consideration in order to be valid. The common law indicates that to be valid under the law, all promises should be backed by consideration.	Not applicable.	Not applicable.	Not applicable.	Not applicable.	Not applicable.